BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DOUGLAS C. GERDING, DECEASED[1]	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,041,659
DART CHEROKEE BASIN OPERATING COMPANY,	)	
LLC & CHEROKEE BASIN PIPELINE	)	
Respondent	)	
	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the March 20, 2012, Award on remand entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes. The Workers Compensation Board heard oral argument on September 11, 2012. E. L. Lee Kinch of Wichita, Kansas, was appointed as a Board Member Pro Tem for purposes of this appeal in place of former Board Member David A. Shufelt.

APPEARANCES

Thomas M. Warner, Jr., of Wichita, Kansas, appeared for Jolie Gerding, claimant's surviving spouse. JoLynn Oakman of Wichita, Kansas, appeared as guardian ad litem for Justin Wallace. Joan M. Bowen of Wichita, Kansas, appeared as guardian ad litem for Austin Gerding. Kendall R. Cunningham of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent). John Terry Moore of Wichita, Kansas, guardian ad litem for Jalie Wallace, and Mel L. Gregory of Wichita, Kansas, guardian ad litem for Jessica Gerding, were notified of oral argument, but did not appear.

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[1] On January 13, 2011, Jolie Gerding was granted Letters of Special Administration in the District Court of Sedgwick County, Kansas, in Case No. 11PR0045 captioned "In the matter of the Estate of Douglas C. Gerding[,] deceased." However, the administrative file contains no order substituting Jolie Gerding, Special Administrator of the Estate of Douglas C. Gerding, deceased, as claimant. Therefore, Douglas C. Gerding, deceased, remains the claimant.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, on March 19 and 20, 2012, a stipulation and attachments were filed by Mr. Warner and Mr. Cunningham regarding the appointments and oaths of the guardians ad litem and attorney-client employment agreements between each guardian ad litem and Mr. Warner.[2] All of the appointments, oaths and attorney-client employment agreements appear to have been executed in March 2012.

At oral argument, the parties who appeared agreed that if respondent is liable to pay death benefits for the accidental death of claimant, then claimant's dependents are entitled to the death benefits as set out on pages 10 and 11 of the ALJ's Award and payment of funeral expenses not to exceed $5,000.00.

ISSUES

This is a claim for a July 10, 2008, accidental injury and resulting death. On October 21, 2010, ALJ Barnes issued an Award finding claimant's accident and resulting death compensable. In a February 21, 2011, Order, the Board vacated ALJ Barnes' Award because only one guardian ad litem had been appointed to represent claimant's children and stepchildren. The Board remanded the matter to the ALJ so that each minor child would be represented by his or her own counsel.

In her March 20, 2012, Award, ALJ Barnes determined claimant's death arose out of and in the course of his employment. She found claimant's travel as a pipeline operator was an exception to the "going and coming" rule (see K.S.A. 2008 Supp. 44-508(f)) as travel was an intrinsic part of the job. Further, the ALJ found the toxicology analysis conducted at the time of claimant's autopsy was inadmissible pursuant to K.S.A. 44-501(d) because respondent failed to show that claimant's injuries were contributed to by drug use. The ALJ awarded death benefits to Jolie Gerding as surviving spouse, and to the conservator(s) of Justin Wallace, Jalie Wallace, Jessica Gerding, and Austin Gerding, all minor dependents at the time of claimant's death.[3] The ALJ also awarded funeral expenses not to exceed $5,000.00.

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[2] Also included in the attachments is a September 12, 2011, letter to Ms. Oakman from Justin Wallace stating that he understands she was appointed as his guardian ad litem and that he has the opportunity to hire another attorney if he desires. In the letter he asks Ms. Oakman to continue to represent his interest in claimant's workers compensation case.

[3] At the time of the September 12, 2011, regular hearing, Justin Wallace was over the age of 18. The ALJ found Mr. Wallace met his burden of proving he is a student enrolled full time in an accredited institution of higher education (see K.S.A. 2008 Supp. 44-510b).

Respondent requests the Board reverse the Award and find claimant's dependents are not entitled to compensation. Respondent maintains claimant was not in the course and scope of his employment when the accident occurred. In addition, respondent argues compensation should not be allowed, based on the defense found in K.S.A. 2008 Supp. 44-501(d), as claimant's accidental injury was contributed to by impairment caused by his use of drugs.

Jolie Gerding requests the Board affirm the Award in all respects. She maintains claimant's death arose out of and in the course of his employment. Mrs. Gerding also contends the blood alcohol test and toxicology analysis are inadmissible as they do not comply with K.S.A. 2008 Supp. 44-501(d). Further, she argues there is no scientific evidence that claimant was impaired at the time of his death and there is no evidence that drugs or alcohol contributed to his death.

The four guardians ad litem filed letters similar to each other with the Board, primarily stating that they agree with the points made in the brief filed by Mr. Warner and that they had nothing further to offer with respect to briefing the legal and factual issues.

The issues before the Board on this appeal are:

1. Did claimant perish as the result of a personal injury by accident arising out of and in the course of his employment with respondent? Specifically, does the "going and coming" rule as set out in K.S.A. 2008 Supp. 44-508(f) apply? If so, was there an applicable exception to the "going and coming" rule?

2. Are the results of a chemical test of claimant's blood admissible under K.S.A. 2008 Supp. 44-501(d)(2)? If so, were there sufficient amounts of benzoylecgonine to trigger the conclusive presumption in K.S.A. 2008 Supp. 44-501(d)(2) that claimant was impaired at the time of his accident? If the conclusive presumption that claimant was impaired at the time of the accident applies, can the conclusive presumption be overcome by medical evidence that claimant was not impaired? If claimant was impaired, did his impairment contribute to his death?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant resided in Elk Falls, Kansas, and was an operator for respondent.[4] His job as an operator required him to check on compressor sites for natural gas or sales point sites and perform necessary maintenance. A compressor site is also referred to as a sales

[4] Cherokee Basin Pipeline is owned by Dart Cherokee Basin Operating Company, LLC.

station. A sales point site is a location where the quality of gas is changed. Claimant had a company truck and drove it home every day. He was expected to travel from home each workday in the company truck and arrive at the first compressor site at a designated time. Claimant carried the necessary tools furnished by respondent on the company truck and he was provided a gas card to purchase fuel for the truck, when needed.

Claimant would work 11 consecutive days, followed by three days off. The first seven days claimant would be on call, followed by four regular workdays. During the on-call days claimant was required to respond to calls for repairs 24 hours a day. He also performed his regular work duties. During the four days that were regular workdays, he was expected to perform his regular work duties, but would give priority to responding to emergency calls that he received. On the regular workdays claimant would go to sites and check on equipment at the sites. He was provided a company cell phone and he wore a company uniform. Claimant's wife, Jolie Gerding, testified that claimant traveled extensively in order to perform his job duties.

Jolie Gerding testified that on July 10, 2008, claimant was on call. That meant he would perform his regular job duties, but was required to respond to calls from respondent. At 5:30 a.m. on July 10, 2008, Mrs. Gerding heard claimant's company cell phone ring and handed it to him. Claimant left the house in his company truck a few minutes later. She believed he was heading toward a site in the direction of Coffeyville. At 6:35 a.m. she was notified that her husband was in a motor vehicle accident and she immediately left and went to the scene, but claimant had already passed away. Mrs. Gerding testified she had no personal knowledge of claimant using marijuana, cocaine, or other illegal drugs. She testified that the night before the accident claimant went to bed at 9:30 p.m. On the day of the accident, claimant was in the 11th day of his 11-day work cycle. Mrs. Gerding testified that during that 11-day cycle, claimant had numerous calls and had to work through the July 4th holiday.

Justin R. Hall, co-worker and direct supervisor of claimant, testified claimant was on his way to the South Williams sales compressor site, the first place on his route, when the accident occurred. He testified that in the mornings, claimant would leave home and follow a morning route checking compressor sites until arriving at respondent's field office. In the evening claimant followed an evening route, checking compressor stations and eventually arrive at home.

Mr. Hall testified that when on call, claimant would be required to drop whatever he was doing and respond to the call. When that happened claimant would get into the company truck and proceed to the site that needed maintenance. If claimant received no calls, he would proceed to go on his normal work route.

Brian Beaumont, Mr. Hall's supervisor and claimant's indirect supervisor, testified claimant would carry protective gear and specialized tools on the truck. When claimant made his routes he would check compressor stations for temperatures, pressures, volumes

and levels. Mr. Beaumont testified that respondent could require claimant to pick up items on his way to the first job site. Mr. Beaumont or Mr. Hall would make a route list of compressor stations claimant was to check each week. Claimant was required to keep a daily activity log to document his daily activities, but was not required to clock in. Most operators worked more than 40 hours a week. The operators, like claimant, were required to record readings from compressors on a daily work sheet. Claimant was required to turn in his paperwork at the field office after his morning rounds. Operators were required to be at the first site at 7 a.m. Mr. Beaumont also indicated that operators and senior operators started their day by going from their homes in a company truck to the sites. After claimant finished stopping at the last site on his evening route, he was required to inform his supervisor by cell phone.

Mr. Beaumont was asked to review claimant's past daily activity reports and daily time sheets. He testified that claimant's daily activity report for July 8, 2008, indicated claimant wrote down that he performed rounds and paperwork from 6 to 9 a.m. On July 6, 2008, claimant wrote rounds/paperwork from 6 to 10 a.m. and indicated the same on the July 5 daily activity report. Mr. Beaumont acknowledged that on almost all the days claimant worked from March through July 8, 2008, the daily activity report starts at 6 a.m. Mr. Beaumont confirmed the hours an operator listed on their time sheet would not match the hours on their daily activity report. For example, on July 1, claimant turned in 13 hours of work on his time sheet, but only recorded 9 hours beginning at 6 a.m. on the daily activity report. Mr. Beaumont testified he relied on the time sheets as he generally knew the hours the operators were working. He reviewed all of claimant's time sheets and approved claimant's time. Mr. Beaumont testified that from claimant's daily activity reports and time sheets (Clines Depo., Exs. 2 and 3) there was no evidence that claimant was not being paid for the time he left home and drove to the first job site.[5]

Michael V. Graves testified he was a pipeline manager for respondent. The chain of command was that Kathy J. Hinkle was district manager, Mr. Graves was a pipeline manager, Mr. Beaumont was pipeline supervisor, Mr. Hall was operations foreman, followed by claimant, who was an operator. Mr. Graves confirmed pipeline operators were paid from time sheets they kept. Mr. Graves testified pipeline operators are paid starting with when they arrive at the first compressor site, not from when they leave home. However, when pipeline operators complete their evening routes, they are paid wages for the time they travel from the last compressor site to their home. This was called the "one-way policy." If an operator was called out for a job during a time period he was on call, that operator would be paid from the time he left home.

Kathy J. Hinkle, district manager for respondent, indicated that claimant was required to have his cell phone turned on 24 hours a day, 7 days a week. The only exception would be if claimant was out of town for vacation, etc. She corroborated

[5] Beaumont Depo. (Jan. 28, 2010) at 98-99.

Mr. Graves' testimony that pipeline operators were not paid for the time they drove from their home to the first compressor site, but did pay them for the time they drove home in the evening after checking the last compressor site. Ms. Hinkle confirmed this was called the "one-way policy," but that this policy was not in respondent's Policy and Procedure Manual, Employee Handbook, or Job Description for pipeline operators. Ms. Hinkle had heard about the "one-way policy" prior to claimant's death, but confirmed its existence with Mr. Graves following claimant's death. She acknowledged claimant's use of a company truck to travel from his home to the first compressor site was an integral part of his job.

Jennifer Clines was the office manager for respondent at the time of claimant's death and her supervisor was Ms. Hinkle. Ms. Clines indicated that pipeline operators would turn their time sheets into their supervisor, who would review and approve them. Ms. Clines would make sure the hours added up and send the time sheets on to the payroll department in Mason, Michigan. Each pipeline operator would enter a code on their time sheet next to the hours they worked indicating the location they worked. They would also indicate if they were regular hours or "call-out hours" when they were called to work. Pipeline operators were paid time and one-half wages for "call-out hours." Ms. Clines did not know if pipeline operators were paid from the time they left home in the morning until they arrived at the first compressor site. Nor had she ever heard of the "one-way policy." After reviewing claimant's past time sheets. Ms. Clines agreed that claimant was generally paid for his time beginning at 6 a.m. each day.

Jim Porcaro, vice president of human resources for respondent, testified he had never heard of the "one-way policy" until he read the deposition transcript of Mr. Graves. He did not know what respondent's policy was on paying pipeline operators during the time they traveled from home to the first compressor site or from the last compressor site to their home. He would defer to local managers on how pipeline operators are paid. Mr. Porcaro agreed that if claimant's time sheets indicated he started work at 6 a.m., claimant would be paid starting at 6 a.m. He also agreed that if claimant was paid beginning at 6 a.m., then claimant was working for respondent beginning at 6 a.m.

On April 7, 2008, respondent's chief executive officer approved a Drug and Alcohol Misuse Policy, which was implemented in Kansas on July 2, 2008. A safety meeting was held in Kansas on July 2, 2008, to present the new drug and alcohol policy to employees. Claimant attended that meeting. Mr. Porcaro testified that the Drug and Alcohol Misuse Policy had no impact on the decision of the Sedgwick County, Kansas, Coroner's office to perform a drug test on claimant.

Numerous company documents were placed into evidence. None of the documents specifically stated whether claimant would be paid beginning when he left home or when he arrived at the first compressor site. The only mention of working hours is in respondent's Employee Handbook. It states that with prior approval of an employee's supervisor, the employee can adopt a regular working schedule where they begin the eight-hour day between 7 and 8:30 a.m. and end between 4 and 5:30 p.m. Employees were

expected to work overtime, but it must be pre-approved by their supervisor. None of respondent's policies or documents makes reference to the "one-way policy."

Montgomery County EMS personnel were already at the accident scene when Elk County Sheriff Douglas L. Hanks arrived. After Kansas Highway Patrol (KHP) Trooper Jason Black arrived, he took over the investigation. Respondent was contacted and Mr. Beaumont arrived soon thereafter. Sheriff Hanks observed Trooper Black order Elk County Special Deputy Coroner Kenneth Mitchell to draw blood and photographed Mr. Mitchell drawing the blood. Sheriff Hanks found no evidence at the scene that indicated claimant possessed alcohol or illegal drugs.

After arriving at the accident scene, Trooper Black began diagramming the scene while he had Mr. Mitchell draw a blood sample from claimant. Trooper Black testified that in fatality accidents, it was the KHP's policy on the date of the accident to draw blood on all drivers of all vehicles. The Kansas Bureau of Investigation tested the blood sample and in a September 3, 2008, Forensic Laboratory Report indicated it was negative for alcohol.

Trooper Black spoke to respondent's employees – Tony D. Williams, Mr. Graves and Mr. Beaumont – at the accident scene. Mr. Williams is respondent's safety manager. Trooper Black testified there was no evidence that claimant was under the influence of alcohol or drugs at the time of the accident, although a prescription medicine bottle of claimant's was found at the scene.

As part of his investigation, Trooper Black interviewed Mrs. Gerding. She informed him that claimant did not do illegal drugs, nor had he been a drinker. Claimant had been taking Lexapro, Nexium and Buspirone. Trooper Black concluded that claimant either fell asleep at the wheel or had a medical problem that contributed to the accident. There was no evidence, such as skid marks, that claimant was trying to avoid anything. Claimant's company truck left the roadway, hitting a guardrail, taking it out until striking the west side of a bridge. Trooper Black determined that at the time of the accident, claimant was exceeding the speed limit by four or five miles an hour. Trooper Black also concluded that claimant was not wearing a seat belt, as he was ejected through the driver's window of the company truck.

Kenneth Mitchell, paramedic, director of Elk County EMS and Special Deputy Coroner for Elk County, received a call about the accident and arrived at the scene shortly thereafter. A few minutes after arriving he learned claimant was deceased. When he arrived, Sheriff Hanks and Trooper Black were already at the accident scene. Mr. Mitchell immediately began investigating the accident by reviewing the accident scene and looking at the physical evidence. His initial conclusion was that claimant fell asleep causing him to lose control of the vehicle. Claimant was in his work uniform, driving the company truck. Mr. Mitchell then loaded the body into a body bag in preparation for it to be transported for an autopsy. Before he did so, Mr. Mitchell drew blood at the request of Trooper Black for his investigation. Mr. Mitchell testified the only reason he drew a blood sample was

because he was asked to do so by Trooper Black. Otherwise, he would not have done so. Mr. Mitchell testified there was no evidence that the wreck and resulting death of claimant were caused or contributed to by alcohol or drugs. No alcohol or drugs were found at the scene.

One of the duties of Mr. Williams, respondent's safety manager in 2008, was to investigate company accidents. He learned of the accident from Mr. Graves and went to the accident scene. Mr. Williams asked Trooper Black for permission to take photos and measurements at the accident scene and permission was granted. Mr. Williams testified that he and Trooper Black shared information including measurements. Mr. Williams was told by Trooper Black that an autopsy would be done as a matter of law and that a toxicology report would be part of the autopsy. However, Mr. Williams agreed the reason the autopsy was performed had nothing to do with respondent's company policy. Mr. Williams also acknowledged he did not request a blood sample be drawn pursuant to respondent's drug policy.

Mr. Williams testified claimant was wearing his company uniform, traveling in the company truck when the accident occurred. He indicated claimant was required to drive the company truck to the first compressor site and that claimant died in the performance of a task related to his normal job duties.[6] Other than getting a soda or cup of coffee, claimant was not allowed to do anything else that was not company business when traveling from his home to the first compressor site.[7]

The company truck claimant was driving has a computer module that records data. Mr. Williams reviewed that data, which indicated claimant was going 68 miles an hour, was not wearing his seat belt and the cruise control was engaged, but later disengaged. He testified there was no evidence of alcohol or drugs at the scene of the accident.

Mr. Williams was familiar with the "one-way policy" and acknowledged there was nothing in respondent's Policy and Procedure Manual or Employee Handbook in effect at the time of the accident concerning the "one-way policy." He did not know what hours claimant was paid to work.

Mr. Williams testified respondent's Policy and Procedure Manual stated that when there is an on-the-job accident or an accident in a company vehicle, the employee may be required to undergo post-accident drug or alcohol testing. On May 23, 2007, claimant signed an acknowledgment that he read, understood and would comply with the Policy and Procedure Manual and Employee Handbook.

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[6] Williams Depo. at 20.

[7] *Id.*, at 33.

On May 18, 2007, claimant was required by respondent to sign a Drug Free Statement indicating he was drug free. It also stated that claimant would be required to undergo a physical and drug screening as a condition of employment and should he test positive for drugs, he would be discharged immediately. On September 28, 2007, claimant struck a deer at 5:35 a.m. in his company truck and was required by respondent to undergo a drug screening for illegal drugs. The results were negative.

Dr. Jaime L. Oeberst, Chief Medical Examiner and District Coroner for the Sedgwick County Regional Forensic Science Center, conducted a postmortem examination. She testified an autopsy determined claimant died of multiple blunt force traumas incurred during the motor vehicle accident. She indicated it was the standard practice of her office to run a toxicology test on all bodies autopsied, but it was not required by federal or state law. She testified claimant's blood was positive for benzoylecgonine at .3 milligrams per liter and carboxytetrahydrocannabinol at 11 nanograms per milliliter. She testified there was no ethanol in claimant's eye fluid. Neither was there any tetrahydrocannabinol, cocaine nor cocaethylene present in claimant's blood or brain. Those are the actual compounds that produce the euphoric effects of marijuana and cocaine.

Claimant's attorney also took the deposition of Dr. Timothy P. Rohrig, Director of the Sedgwick County Regional Forensic Science Center. He is not a medical doctor, but has a doctorate in pharmaceutical sciences with an emphasis in pharmacology and toxicology and is a board-certified forensic toxicologist. He was unaware of any state or federal law that required the body of a person who died in a motor vehicle accident to be tested for illegal drugs. Dr. Rohrig testified the Sedgwick County Regional Forensic Science Center's laboratory is not approved by the United States Department of Health and Human Services nor is it licensed by the Department of Health and Environment.

Dr. Rohrig testified he tested claimant's blood at the request of Dr. Oeberst using an initial screening known as an immunoassay screening. That screening determines whether drugs being tested for in the blood have reached a certain cutoff level. If so, the blood is tested using a gas chromatography-mass spectroscopy (GCMS) test. In claimant's case the immunoassay screening indicated claimant's blood was positive for benzoylecgonine and carboxytetrahydrocannabinol. The GCMS testing identified and quantified the benzoylecgonine and carboxytetrahydrocannabinol. Dr. Rohrig indicated that benzoylecgonine and carboxytetrahydrocannabinol are inactive metabolites (the former of cocaine and the latter of tetrahydrocannabinol, the active ingredient in marijuana) that have no effect on the body. Claimant's eye fluid tested negative for alcohol. Dr. Rohrig testified claimant was not impaired at the time of the accident by cocaine, marijuana or alcohol. He testified there is no toxicologic or scientific validity to the conclusive statutory presumption of impairment because carboxytetrahydrocannabinol and benzoylecgonine are inactive metabolites that cannot cause an impairment.

None of the witnesses involved in the drawing or testing of claimant's blood testified that claimant consented to have his blood drawn and tested, that it was tested because of respondent's drug policy or did so in order to provide medical treatment.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[8]

Respondent's first defense is that claimant did not sustain a personal injury by accident arising out of and in the course of his employment, because claimant's accident occurred on the way to work. In support of this defense, respondent argues the "going and coming" rule as set out in K.S.A. 2008 Supp. 44-508(f) applies. The Board disagrees.

"[T]he question of whether the 'going and coming' rule applies must be addressed on a case-by-case basis."[9] The rationale for the "going and coming" rule is based upon the premise that while on the way to or from work, the employee is subject to the same risks or hazards as those to which the general public is subjected and, therefore, those risks are not causally related to the employment. However, in *Halford*,[10] the Kansas Court of Appeals upheld the Board's finding that where travel is an intrinsic part of an employee's job, the "going and coming" rule does not apply.

Here, there is ample evidence to support a finding that travel was an intrinsic part of claimant's job. Claimant would leave home each morning dressed in his company uniform in a company truck that held equipment necessary for him to complete his job

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[8] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[9] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 438, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

[10] *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008).

duties. Claimant would travel directly to the first job site without going to respondent's office. Mr. Beaumont, who was the direct supervisor of claimant's supervisor, testified that claimant was paid from 6 a.m., the time he left home.

Respondent argues its policy was to pay its operators, such as claimant, from the time they arrived at the first job site until they arrived at home in the evening. However, there was no evidence such written policy existed. Respondent also contends claimant completed his own time sheets, which were not properly reviewed by Mr. Hall and other supervisors. The Board finds it significant that Mrs. Gerding testified that on the day of the accident, claimant was on call. That meant he had to have his cell phone on 24 hours a day and was required to respond to all calls. When claimant responded to a call, respondent paid claimant from the time he left home. That is consistent with how claimant was paid on his normal workdays, despite respondent's contention that claimant was not supposed to be paid until he arrived at the first job site.

Respondent's second defense is based upon K.S.A. 2008 Supp. 44-501(d), which states in part:

> (2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:
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> | | Confirmatory test cutoff levels (ng/ml) |
> |---|---|
> | Marijuana metabolite[1] | 15 |
> | Cocaine metabolite[2] | 150 |
> | Opiates: | |
> | Morphine | 2000 |
> | Codeine | 2000 |
> | 6-Acetylmorphine[4] | 10 ng/ml |
> | Phencyclidine | 25 |
> | Amphetamines: | |
> | Amphetamine | 500 |
> | Methamphetamine[3] | 500 |

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.
[2] Benzoylecgonine.
[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

An employee's refusal to submit to a chemical test shall not be admissible evidence to prove impairment unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;

(B) the test sample was collected at a time contemporaneous with the events establishing probable cause;

(C) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

(D) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;

(E) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

(F) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

(3) For purposes of satisfying the probable cause requirement of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:

(A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

(B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;

> (C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or
>
> (D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly implemented at the time of testing.

Postmortem testing of claimant's blood revealed he had 300 ng of benzoylecgonine per milliliter, which pursuant to K.S.A. 2008 Supp. 44-501(d)(2) is a conclusive presumption that claimant was impaired at the time of the accident. Claimant raises several objections to the drug testing, including: (1) no probable cause, (2) the testing was not done by a laboratory approved by the United States Department of Health and Human Services or licensed by the Department of Health and Environment and (3) the requirements of K.S.A. 2008 Supp. 44-501(d)(3) were not met.

In order for there to be probable cause, respondent must establish one of the circumstances set out in K.S.A. 2008 Supp. 44-501(d)(3). Testing claimant's blood, eye fluid and tissue was not done as a result of respondent's drug testing policy. Samples were taken and tested as a part of the Kansas Highway Patrol's and the District Coroner office's standard operating procedures. Obviously, the blood, eye fluid and tissue were not tested in the normal course of medical treatment for reasons related to the health and welfare of claimant, as he was already deceased when the samples were taken. Nor was claimant able to consent to having his blood, eye fluid and tissue tested. Respondent proffered no state or federal law that was in effect at the time of the accident requiring claimant's blood, eye fluid and tissue to be tested for alcohol or drugs. No witness testified that a state or federal law required testing of claimant's blood, eye fluid and tissue.

Simply put, there was no probable cause to test the blood, eye fluid and tissue of claimant for alcohol or illegal drugs. None of the circumstances in K.S.A. 2008 Supp. 44-501(d)(3) that create probable cause existed. Claimant's wife testified she was unaware of claimant using illegal drugs. Nor was there any evidence at the accident scene to indicate claimant might have been consuming illegal drugs.

Claimant next asserts that the Sedgwick County Regional Forensic Science Center was not a laboratory approved by the United States Department of Health and Human Services or licensed by the Department of Health and Environment, as required by K.S.A. 2008 Supp. 44-501(d)(2)(D). Insufficient evidence was presented by respondent that the Sedgwick County Regional Forensic Science Center was a laboratory approved by the United States Department of Health and Human Services or licensed by the Department

of Health and Environment. Therefore, the toxicology results from the Sedgwick County Regional Forensic Science Center are excluded on that basis.

Claimant also contends the toxicology results were not confirmed by a GCMS test. The Sedgwick County Regional Forensic Science Center did confirm the results of the immunoassay screening using the GCMS test. Claimant seems to imply that a GCMS test from another laboratory should have been performed. The Board finds that the requirements of K.S.A. 2008 Supp. 44-501(d)(2)(E) have been met.

The final argument raised by claimant's attorney is that respondent failed to prove claimant's death was contributed to by drugs or alcohol because the metabolites found in claimant's blood and tissue were inactive, which overcomes the conclusive presumption that claimant was impaired at the time of the accident. Drs. Oeberst and Rohrig testified benzoylecgonine and carboxytetrahydrocannabinol, which are inactive metabolites for cocaine and marijuana, were present in claimant's blood. They also testified that tetrahydrocannabinol, cocaine and cocaethylene, active compounds for marijuana and cocaine, were not present in claimant's blood. Dr. Rohrig concluded claimant could not have been impaired at the time of the accident.

The foregoing issue was addressed by the Kansas Court of Appeals in *Wiehe*.[11] Wiehe tested positive for marijuana at a level that pursuant to K.S.A. 44-501(d) conclusively presumed he was impaired at the time of the accident. Wiehe testified he last smoked marijuana the night before the accident. An expert testified on behalf of Wiehe that he could not possibly have been impaired at the time of the accident as the effects of the marijuana had worn off. The Kansas Court of Appeals concluded that the expert's testimony could not be used to supersede the plain and unambiguous language of K.S.A. 44-501(d). The Board is obligated to follow case law and finds that if claimant's blood test results for drugs were admissible, those test results establish a conclusive presumption that claimant was impaired by drugs at the time of the accident.

CONCLUSION

1. Claimant's death was sustained by a personal injury by accident arising out of and in the course of his employment and the "going and coming" rule does not apply.

2. There was no probable cause to test claimant's blood, eye fluid and tissue for alcohol or drugs and, therefore, the test results are excluded.

3. Respondent failed to prove the Sedgwick County Regional Forensic Science Center was a laboratory approved by the United States Department of Health and Human Services or licensed by the Department of Health and Environment.

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[11] *Wiehe v. Kissick Construction Co.*, 43 Kan. App. 2d 732, 232 P.3d 866 (2010).

4. If there had been probable cause to test claimant's blood, eye fluid and tissue, the requirements of K.S.A. 2008 Supp. 44-501(d)(2)(E) were met.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[12] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the March 20, 2012, Award entered by ALJ Barnes by finding the "going and coming" rule does not apply, but affirms the Award in all other respects.

IT IS SO ORDERED.

Dated this ____ day of December, 2012.

BOARD MEMBER

BOARD MEMBER

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[12] K.S.A. 2011 Supp. 44-555c(k).

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